IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

RICHARD H. FLETCHER,
PLAINTIFF IN ERROR,

v.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY.

No. 56.

In Error to the Court of Appeals of the District of Columbia.

BRIEF FOR DEFENDANT IN ERROR.

This action was brought to recover damages for bodily injuries alleged to have been inflicted on the plaintiff by a piece of timber thrown from a moving train in the city of Washington. At the trial, after hearing the plaintiff's witnesses, the court directed a verdict and judgment for the defendant. On appeal to the Court of Appeals, this judgment was affirmed (6 App. D. C., 385). In the hope

of reversing the decisions of the two courts below, the plaintiff has brought this writ of error.

STATEMENT OF THE CASE.

The plaintiff on the trial in the circuit court of the Supreme Court of the District of Columbia testified in his own behalf, and his testimony tended to show that on the 16th day of May, 1890, he was employed by the defendant in its workshops, and had finished his day's work at about a quarter to six in the evening. He then started for home. When he came to South Capitol street and Virginia avenue he stopped to see if he could see any of the workmen coming, in order to have company on his way home. He was standing on the pavement, on the south side of the railroad track. The track ran down the middle of Virginia avenue. As he was standing there, *one of the defendant's work-trains passed by, going, as witness supposed, about* 20 *miles an hour.* These were open flat cars. There were a number of workmen on the cars returning from their day's work down the road and going home. *One of them threw from the car, just as it was passing plaintiff, a stick of bridge timber six inches square and about six feet long,* which struck and injured the plaintiff (4, 5).

Other testimony showed that the timber was thrown by a laborer named George Washington, who was riding on the train. There were a number of workmen on the train returning from their day's work down the road and going home, about six o'clock in the evening (6). The plaintiff did not produce Washington as a witness.

There was no attempt to prove that said George Washington had ever before thrown timber or anything else from this or any other train. No proof was offered to

show whether or not the piece of wood belonged to Washington, or to whom it belonged, nor to show for what purpose Washington threw it. For aught that appears, he may have thrown it at the plaintiff to gratify his own personal malice, or wantonly. The plaintiff confined his efforts to an attempt to prove that *other* laborers, at some other times and places during ten years before, had thrown wood from this train for use as fuel; but no single definite instance was proven. There was no evidence tending to show the purpose for which this stick of bridge timber was to be used—whether for fuel or for building or manufacturing purposes. The fair inference from the indefinite testimony is that it belonged to the defendant, and was intended by it for use in repairing or building a bridge.

The plaintiff sought to show that it had been the practice of laborers riding on this train to throw from it, while it was passing along the streets of Washington and Alexandria, pieces of wood, old rotten ties, &c., to be afterward carried to their homes by the men and to be used for fuel; and that no orders or regulations had been issued by the defendant's officers prohibiting such practice until after the injury to the plaintiff. For this purpose five laborers were called as witnesses, but their testimony was vague.

Cyrus Hall rode on this train at the date of the accident, but got off at Alexandria. He lived in Alexandria, and had been employed by the defendant and riding on repair trains about two-and-a-half years. During that time he had thrown off some timber and had seen others throw some off. He said he had thrown off wood in Washington for himself and others, four or five or maybe eight or ten times. He testified that they "had never been notified *thoroughly* by the railroad company not to

throw it off," and he also said that "we didn't have no *particular* order by the captain not to do it before the morning that the accident happened."

William Johnson had been employed by the defendant 8 or 9 years; at the time of the accident was a repairman, and was on the car when the piece of wood was thrown off. He said he had seen pieces of timber thrown by the workmen from the work-train when in motion in this city; that he had seen this done quite often, *but how many times he was unable to tell.* This practice continued all the time he was on the road; that the "biggest portion" of the men employed on that train lived in Alexandria, and that the pieces of wood were generally thrown off in Alexandria; not much was thrown off in Washington, because the men who lived in Washington lived a "good ways" from the railroad, and they didn't often bring any wood "up here."

Thomas Coleman had been riding on work-trains nearly two years, and had seen pieces of timber thrown from the train "lots of times." He said about two-thirds of the workmen on this train lived in Alexandria, and that the men would throw off wood, sometimes three, four, and five times a week,—but whether in Alexandria or Washington he did not say.

Edward Noble had been employed with this train, and said he had seen pieces of timber frequently thrown from the train, and he had done it both in Alexandria and Washington; probably as often as *a dozen of times in ten years.* During this time the train came to Washington four or five times a week, and sometimes every day. Over two-thirds of the men employed on the train lived in Alexandria.

John Douglass was employed on the train only about six months, but saw wood, blocks, &c., pitched off the train, but did not remember how often; he had, himself, thrown

off wood in this city once or twice. Nearly all of the men lived in Alexandria.

This was the substance of all the evidence given on this point, and constituted the only claim of the plaintiff to recover against the railroad company for the act of Washington.

It appears, therefore, that these laborers, when they could get possession of a piece of wood, would take it on this train, and when near to their homes would drop it off. It was used for fuel. Most of the laborers lived in Alexandria, and, of course, those men did not carry any of such wood to this city. The proof seems to show quite conclusively that at least two-thirds of these laborers employed on this train lived in Alexandria.

POINTS AND AUTHORITIES.

In no possible view can the plaintiff have a right to recover on such testimony as in this case. To allow him to do so would be to sweep away all boundaries from the already sufficiently onerous doctrine that the employer is liable for the act of the employee, *within the scope of the employment*, and therefore would make the employer liable for *all* the acts of any person in his employ, no matter how disconnected from the employment,—in other words, an insurer of the public gratis against all accidents from such a source. The more closely the case is examined, the more clearly this will appear.

First. The act of Washington, the plaintiff's fellow-servant, complained of in this suit, was no part of his employment. His day's work had been done, and he was on his way home, as was the plaintiff. The throwing of this piece of timber was not connected, in the remotest degree, with the performance of any duty as a laborer or repairman

on the road. It was the independent act of the man who threw it off, for which he alone is liable, and the defendant cannot be held responsible for the consequence.

The courts have always maintained carefully the distinction between acts within and those outside of the scope of employment.

In *Howe* v. *Newmarch*, 12 Allen, 57 (1866), the rule is thus stated:

"If the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another, not within the scope of his employment, the master is not liable."

The subject is well discussed in Buswell on Personal Injuries, section 37, also at p. 47; also in 2 Wood on Railroads, p. 1391, which cites *M'Clenaghan* v. *Brock*, 5 Rich. Law (South Carolina), 17. In that case a slave was a passenger on a steamboat, and the engineer wounded him by negligently firing a gun. It was held that the captain was not liable, because the act was outside the scope of the engineer's duty.

In another case, the plaintiff's steamboat was moored to defendant's wharf and took fire in the night. Defendant's watchman on the wharf cut the cable, whereby the boat drifted away and was burned. Held, that defendant was not liable for the act of the watchman. (*Thames Steamboat Co.* v. *Housatonic R.R. Co.*, 24 Conn. 40.)

Where a boy six years old ran alongside a street car, and shook his hand playfully at the driver, and the driver struck him with the reins, causing him to fall under the car and become injured, the company is not liable, because a master is liable for the tort of his servant only when the act is committed by the servant *bona fide* as such, and in the line of

his employment. (Chicago City Ry. Co. *v.* Mogk, 44 Ill. App. 17.)

Misconduct of train hands, not in the discharge of their duties, in shouting so as to frighten a horse, will not render the railroad company liable for damages resulting therefrom. (Cobb *v.* Columbia and G. R. Co. (S. C.), 37 S. C. 194.)

Other cases are collected in 14 Am. and Eng. Cycl. Law, p. 809, title, "Master and Servant."

Two Massachusetts Cases.

In the argument below and the opinion of the Court of Appeals (12), attention was devoted largely to the two cases in Massachusetts illustrating opposite phases of this question. Each was tried before a judge without a jury, but instructions were asked in the usual form.

The first in time is that relied upon by the plaintiff, *Snow* v. *Fitchburg RR. Co.* (136 Mass., 552), but it will be found wholly different from the present case. Colburn, J., said in that case: "The plaintiff was a *passenger* on the railroad of the defendant, and properly *on the platform at the station.* * * * The plaintiff *sustaining this relation* to the defendant, and *being in this place*, the defendant was bound to exercise towards her such care and diligence as could reasonably be exercised to *protect* her from such injuries as human foresight could anticipate and prevent."

In the present case, Fletcher, so far from being a passenger, standing at a station, entitled to special protection, was either a fellow-servant or a casual passer-by.

Again, Colburn, J., said: "The defendant voluntarily furnished a car to run on its express train, from which it *knew* that mail bags *were to be* thrown at the station where

the plaintiff was, when the train was under full speed. *Obviously* * * * danger was likely to result to *passengers* on the platform of the station. * * * The case presented is unlike that of the act of a passenger, which the defendant had no reason to anticipate or power to prevent."

It is evident that in furnishing a mail car on this express train the Fitchburg Railroad must have known that it would be used for the very purpose of delivering mail bags, and from the statement of the case it seems that it had actual notice that mail bags would be delivered at this station ; and as it knew in making its time tables that its own train did not stop there, it knew that the mail bag must be flung off at full speed. Carrying the mails was part of its business. The court adds that there was evidence tending to show that the mail bag had not unfrequently been so thrown as to strike *on this very platform ;* and that the defendant had power to prevent this practice, if in no other way, by withholding the use of the car, or by stopping the train at the station.

That case was the same in law as if the mail bag had been flung into a passenger car and struck a passenger rightfully sitting there. To say, as in plaintiff's brief (p. 15), that it would have made no difference in the decision if the injured person had not been a passenger, is merely a bold assertion of counsel's opinion. The case itself is certainly no authority or precedent to that effect, for it is expressly founded on the doctrine of passenger and common carrier.

Over a year later, in 1885, with the foregoing case doubtless in mind, the same court decided *Walker* v. *N. Y. Central Sleeping Car Co.*, in which the facts were that one Maxwell, the porter on a sleeping car running between Albany and Boston, as his train was passing through

Newton, went out on the platform of his car and threw off a bundle containing soiled clothing and other articles belonging to himself. He had arranged, the day before, with a woman who lived near this point that he would throw the bundle off, and that she should get it and wash the linen. He had never thrown a bundle off before. This bundle struck and injured the plaintiff, Walton, and he brought suit against the sleeping car company. It was the duty of this porter to take care of the car, to keep it clean, and to wait upon the passengers, but he had nothing to do with washing the linen used in the car.

The trial judge ruled that upon all the evidence the plaintiff could not recover, and said:

"The defendant is not responsible if the injury to the plaintiff was done by Maxwell, the servant of the defendant, without the authority of the defendant, and not for the purpose of executing the defendant's orders, or doing the defendant's work, and not while acting as such servant in the scope of his employment. If Maxwell was employed by the defendant as a porter upon its parlor car, and wholly for a purpose of his own, and disregarding the object for which he was employed, and not intending by his act to execute it, negligently threw a bundle, his own property, from the platform of the parlor car, and thereby the plaintiff, *who was not a passenger*, was hit and injured while in the exercise of due care, and if this injury was done by Maxwell not within the scope of his employment, then the defendant is not liable. If, however, Maxwell negligently threw a bundle in the execution of the authority given him by the defendant, and for the purpose of performing what the defendant had directed, or if the injury to the plaintiff was done by Maxwell while acting within the scope of his employment, then the defendant would be liable."

In affirming this judgment the supreme court of Massachusetts used this language, to wit:

W. ALLEN, J. "The rulings and instructions of the court were correct. There was no evidence that Maxwell was employed by the defendant to take care of his own clothing and personal effects. The act complained of was not within the scope of his employment; and it is wholly immaterial that he was, at the moment, riding in a car of the defendant in which he was employed by it for other purposes."

The efforts of the plaintiff to distinguish between this case and the one at bar serve only to bring out the resemblance more clearly.

There is *no proof* that George Washington had ever thrown a stick of wood from the train before that time; and certainly the defendant is not bound to prove a negative in that respect. The plaintiff's case seems to be founded wholly on assumptions instead of facts. The plaintiff expects the court to assume that this "stick of bridge timber" (plaintiff's brief, p. 2) was intended by somebody for firewood; but there is no proof that George Washington desired or needed firewood. Why should we not assume that the piece of bridge timber was properly and lawfully on the car, and that George Washington threw it at the plaintiff wantonly or for the purpose of injuring or scaring him? This supposition is just as fair and reasonable as the other, in the absence of proof; and if Washington threw the bridge timber for any purpose of his own, to gratify his private hate, or any other wanton or mischievous purpose, the defendant cannot be held responsible. Here there was no possible color of discharging his duty on the part of the man who threw off the bridge timber. His day's work was over, and the timber was no part of the load which had been on the train.

The master is not liable for the independent wrong act

of the servant not commanded by the master or ratified by him, but perpetrated to gratify the private hate of the servant, although done under color of discharging his duty to his employer.

Baum *v.* R.R Co., 26 Ind. 70.
Isaacs *v.* 3d Ave. R.R., 47 N. Y. 122.
McManus *v.* Crickett, 1 East. 106.
Gregory *v.* Piper, 9 B. & C. 591.
Croft *v.* Alison, 4 B. & Ald. 590.
Mali *v.* Lord, 39 N. Y. 381.

Second. Foreseeing the obstacle of the doctrine concerning scope of employment, the plaintiff seems to have thought to overcome it by proving some sort of usage or habitual practice, on the part of the men carried on this train, of throwing off pieces of wood, and therefore he undertook to prove that they did habitually bring into this city wood of various kinds for their own use *as fuel*, and that they threw it off this train habitually, and that the defendant should have known of the existence of this practice, and was therefore chargeable with full knowledge of it. Now, it will not be overlooked that the plaintiff made no effort to show that this particular piece of bridge timber was intended to be used as fuel; if the proof had successfully shown that the practice of throwing off wood did actually prevail, as was claimed, still the plaintiff could not claim the benefit of this usage without first showing that this stick of bridge timber was intended for use as firewood or fuel, and that it was thrown off for that purpose; but there is nothing in the evidence to show that it was not the property of the company and was not properly on the train. There being no such proof offered, the plaintiff failed to bring his case within the alleged usage.

It will hardly be insisted, if this stick of bridge timber

was the property of the defendant, and belonged on the train, and under those circumstances was, without any authority, pitched off by an employee whose employment had ceased for that day, and without any reason for the act being shown, that the defendant would be liable. Suppose a laborer riding home on a train of cars loaded with coal, passing through the city, should, mischievously or otherwise, throw a chunk of coal at a person on the street and injure him, would the railroad company be liable for the injury? According to the above-cited authorities, it would not be.

In O'Neill *v.* Keokuk, etc., R.R. Co. (45 Iowa, 546) it was held that evidence showing that the employees of a railroad company were accustomed to act in violation of a rule of the company is not admissible to establish a waiver of the rule, unless it be shown that the custom was known to the officer charged with the enforcement of the rule. It could not be so regarded by reason simply of a custom on the part of those for whom it was made to violate it. (27 Am. and Eng. Cycl. Law, 900, 901.)

The objection to the novel and unsupported doctrine put forward by plaintiff is that, once admitted, there are no possible limits to its application. Suppose that a laborer riding home on a flat car lighted his pipe and threw the burning match in the eye of some person standing near the track. It would be easy to prove a "custom" on the part of workmen to smoke pipes on their way home. Could it be argued that the railroad company was liable because it did not make an order forbidding its laborers to smoke, or directing the careful extinguishment of matches?

Moreover, if the practice of throwing wood from this train was so incessant and notorious as the plaintiff argues in his brief, it seems that the plaintiff, an employee of the

same road and going home at the same hour, must have been aware of it, and was guilty of contributory negligence in standing so close to the train as it passed.

There is an inevitable gap in all the arguments for plaintiff which no ingenuity or ability of counsel can close. Thus, it is said that a moving train is "an instrument of danger" (p. 4.), which is true; but then the plaintiff was not hurt by the train, but only by the interposed free-will act of Washington, in throwing the timber. If Washington had not been on the train when he threw this timber, the plaintiff might have been just as much hurt. A case is cited in regard to a torpedo (*Walker* v. *Hannibal, &c., R.R. Co.*, 26 S. W. Rep. 363); but a bridge timber is an inert mass, not an explosive. The defendant here was not bound to chain or nail down every piece of wood on its trains, because somebody might use it as a missile.

The torpedo case just mentioned is not applicable here. The injury was to a boy, and the negligence of the railroad company, as in the "turn-table case" (17 Wall. 657), was in leaving dangerous apparatus within reach of children. The distinction is well shown by another torpedo case, *C. B. & Q. R.R.* v. *Epperson* (26 Ill. App. 72), where a fireman took torpedoes from the caboose and put them on the track to assist in a Fourth of July celebration, and it was held that the railroad company was not liable for the consequences of their explosion in that way.

In *Railroad* v. *Derby* (14 How. 468), cited by plaintiff, the conductor was acting clearly within the scope of his employment in directing the movement of the train; and in *Railway* v. *Hinds* (53 Penn. St. 512) the person injured was a passenger. No case is cited which sustains the novel doctrine that the alleged throwing of timber by other persons would make the railroad liable for the

piece thrown by Washington. To make any argument for it, the appellant has to confuse two different things, viz., the running of the work-train, which was the defendant's business, with the throwing of the timber by Washington, which was not its business.

The doctrine "res ipsa loquitur" might apply in a suit against Washington, but it does not go to prove any liability of the railroad company.

Third. The testimony of the plaintiff, given to show the practice of the laborers, was not admissible under the declaration, and could not properly be submitted to the jury.

The declaration charges that the defendant was guilty of negligence, inasmuch as one of its servants at a certain time specified negligently threw a piece of timber from a passing train, and that it struck and injured the plaintiff. This is the only charge of negligence, and it is in the following words and figures:

"That heretofore, to wit, on the 16*th day of May, A. D.* 1890, at the city of Washington, in the District of Columbia, the plaintiff, while peaceably and lawfully on the public streets, to wit, on South Capitol street, near the corner of Virginia avenue, in said city and District, was, by and through the carelessness and negligence of the defendant, its servants and agents, *violently struck in the left inguinal region of the body with a large and heavy piece of timber carelessly and negligently thrown by one of the defendant's servants from one of the cars of the defendant*, whereby the plaintiff was greatly bruised and seriously and permanently injured."

On the trial of this cause, the plaintiff's counsel, appreciating the insufficiency of this statement of his case, sought to enlarge it by producing testimony tending to show that for a long time there had prevailed with the laborers riding on this train a practice of throwing from the train

pieces of wood, timber, &c., to be used by them for fuel. Such testimony was not admissible. The defendant had the right to fair notice of the negligence with which its officers and agents were to be charged. The only charge of negligence was to the effect that the plaintiff was violently struck with a heavy piece of timber negligently thrown, by one of the defendant's servants, from one of the cars of the defendant. There is no allegation here that the defendant had any knowledge of this act, or that it either directed it beforehand, or confirmed and adopted it afterward, nor is there anything in the declaration alleging that the plaintiff knew of this alleged practice or that it ought to have known it. The fundamental rules of pleading require that such charges to be proven must be alleged. The allegation and the proofs must agree. The defendant came into court to defend itself from the charge of misbehavior, based upon a single act which was alleged to have occurred on the 16th of May, 1890, in Washington, and not against a charge of many acts supposed to have been committed at many different and unspecified times, and in and about Alexandria, as well as in Washton.

In 1 Chitty on Pleading (p. 392) it is said: "In an action on the case against a master for the negligence of his servant, it has been decided that the negligence may be stated according to its legal effect, namely, as that of the master, without noticing the servant; but as the object of pleading is to apprise the opposite party of the facts, it is more correct to state them truly." Citing M'Manus *v.* Crickett, 1 East. 106, 110; Brucker *v.* Froment, 6 Term Rep. 659.

In the present case the proof showed that the alleged servant of the defendant was not acting as its servant at the time of the injury, and it is sought to maintain the ac-

tion on a wholly different ground, namely, a usage by which the defendant habitually allowed wood to be thrown from this train by other persons. There is no allegation under which such proof is admissible; in fact, it is legally a variance from the statement in the declaration, that plaintiff was struck with a piece of timber "negligently thrown by *one of the defendant's servants*," which necessarily implies that the servant was acting as a servant, and is not a statement that the defendant negligently permitted the timber to be thrown by a person merely taking a ride on the train.

Fourth. Even if evidence of common practice might have been submitted and considered, it wholly failed to establish any such habitual practice. It is plain from the evidence that the scattered acts mentioned in the very indefinite testimony took place only occasionally, and in both Alexandria and Washington; but most of them took place in Alexandria, where two-thirds of the workmen resided. No one of the witnesses pretends to give an estimate of the number of times this sort of an act was done. The weight of evidence shows that such occurrences were very rare in Washington, and not another instance of the throwing of wood from this train is specified by any witness. No place is specified, no time is given, and the witnesses were speaking of indefinite instances extending over periods of time from six months to ten years.

Plaintiff is certainly not justified in arguing in his brief (p. 3) that it "was the constant and daily habit of the men during all these years" to throw off firewood. It might very well be asked where such an amount of wood could come from along one short section of the line of a railroad company.

Fifth. Both of these men had finished their day's work. The plaintiff had left the defendant's shop where he was employed, and was on his way home; the other, the man

who threw off the piece of timber, was going home on the train. So far as the defendant was concerned, it had nothing to do with either of them. But if it did, then they were fellow-servants, and the defendant is not liable.

If these two men still sustained the relation of servant in the employment of the master, then the defendant is not liable. A man employed about a repair shop is a fellow-servant of one employed on a train. They are engaged in the common employment of the master. A brakeman on a train of cars is in the same common employment with the mechanics in the shops to repair and keep in order the machinery, with the inspector of the machinery and rolling stock of the road, and with the superintendent of the movement of trains. (*Wonder* v. *B. & O. R.R.*, 32 Md. 411, 418.)

This has been settled recently by the Supreme Court of the United States in the case of R.R. Co. *v.* Hambly, 154 U. S. 349. See also—

Randall *v.* B. & O. R.R., 109 U. S. 478.
B. & O. R.R. *v.* Baugh, 149 U. S. 368.
Tuttle *v.* R.R. Co., 122 U. S. 189.
O'Rorke *v.* R.R. Co., 22 Fed. Rep. 189.
Quebec S.S. Co. *v.* Merchant, 133 U. S. 375.
Rohback *v.* R.R. Co., 43 Mo. 187.
Wood on M. & S., p. 844 *et seq.*, and notes.
Bunt *v.* Sierra Co., 138 U. S. 483.
D. C. *v.* McElligott, 117 U. S. 621.
Murphy *v.* N. Y. Cent. R.R. Co., 11 Daly, 122.
1 S. & R. on Neg., sec. 184 *et seq.*, and note.
Baltimore Elevator Co. *v.* Neil, 65 Md. 438.
Besel *v.* N. Y. C. & H. R. R.R. Co., 70 N. Y. 171.
Smith & Potter, 46 Mich. 258.
C. & X. R.R. *v.* Webb, 12 Ohio St. 475.
Mackin *v.* R.R. Co., 135 Mass. 201.
B. & P. Co. *v.* Jones, 95 U. S. 439.

Conclusion.

We submit that to decide for the plaintiff in this case would establish a novel doctrine, unsupported by precedent or by sound public policy, and dangerous in enlarging to an incalculable degree the liability of employers. The judgment of the court below should be affirmed.

ENOCH TOTTEN,
WM. HENRY DENNIS,
Attorneys for Defendant in Error.